BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DAN G. LEBAKOS INSURANCE AGENCY
EXCLUSIVE REALTY COMPANY
DAN G. LEBAKOS, DBA
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-56
Case No. T-69-9

Employer Account No.

DEPARTMENT OF EMPLOYMENT

STATEMENT OF FACTS

The petitioner appealed from Referee's Decision No. SF-T-2258 which denied the petitioner's application for reopening on the ground that the petitioner had not shown good cause for failing to appear at the referee's hearing which was duly scheduled in San Rafael, California on November 7, 1968.

By decision dated November 12, 1968 the referee dismissed the petition for nonappearance. On November 20, 1968 the petitioner made written response, contending he had not received the notice of hearing and requested that another hearing be scheduled.

The referee then secured an affidavit of a postal carrier. This individual recalls that he had received a change of address for the petitioner to a post office box and delivered the envelope containing the hearing notice to the clerk for delivery to the box number. The following day the notice was again in the carrier's allotment of mail marked "unknown." The carrier again gave it to the clerk to be placed in the box. The following day the notice was returned to the carrier marked "moved." The carrier then had the notice returned to the sender.

After receiving the affidavit the referee wrote to the petitioner at the address the petitioner gave in his letter of November 20, 1968 (which was the same address to which the hearing notice had been sent). The referee related the information he had received from the carrier and also stated that the returned notice of hearing showed evidence of being opened and resealed. He then gave the respondent ten days to show cause why the proceedings should be reopened. No response was received and on January 2, 1969 the referee issued a decision denying the petitioner's application for reopening.

On January 13, 1969 the Department sent a final collection notice to the petitioner scheduling an appointment with the petitioner for January 17, 1969 with a view to arranging payment of the assessment, plus penalty and interest. On January 15, 1969 the petitioner returned the notice with a check in the amount that the Department claimed was owing, along with a notation to "Consider this notice an appeal" and contending that the amount billed was in error. This correspondence was forwarded to this board and has been accepted as a valid appeal.

REASONS FOR DECISION

It is not entirely clear from the correspondence which we have accepted as an appeal whether the petitioner is contesting only the additional interest charged by the Department subsequent to the petition for reassessment or whether he is appealing from the referee's decision denying reopening of the matter. We will assume the appeal includes the latter for purposes of this decision.

The appeal raises several issues. First it must be determined whether the petitioner was entitled to a hearing; second, if this is answered in the negative whether a referee should have, nevertheless, issued a decision on the merits rather than dismissing the appeal. Also to be decided is the effect of the petitioner's payment of contributions, penalty and interest subsequent to the referee's decision.

Section 1134 of the Unemployment Insurance Code provides in part:

> "1134. (a) If a petition for reassessment is filed within the time prescribed, the referee shall review the assessment and if requested by the petitioner shall, unless a hearing has previously been afforded the petitioner on the same grounds as set forth in the petition, grant a hearing. . . . The referee shall render a decision in the matter and may decrease or increase the amount of the assessment. The petitioner and the director shall be promptly notified of the referee's order or decision, together with his reasons therefor."

Section 1951 of the code provides:

> "1951. The manner in which disputed claims, appeals and petitions shall be presented, the reports required thereon from the claimant and from any employing unit and the conduct of hearings and appeals shall be in accordance with rules prescribed by the Appeals Board. The Appeals Board shall require referees to consolidate for hearing cases with respect to which the alleged facts and the points of law are the same."

Section 5033, Title 22, California Administrative Code, provides that a referee shall hold a hearing in a tax proceeding (with an exception not applicable here).

Subsections (c) and (d) of section 5045 of Title 22 provide in part as follows:

> "(c) If an appellant or petitioner fails to appear at a hearing, the referee may issue a decision dismissing the appeal or petition. A copy of the decision shall be mailed to each party together with a statement concerning the right to reopen the appeal as provided in subsection (d).

"(d) Any such dismissed appeal or petition shall be reopened by the referee if the appellant or petitioner makes application in writing within ten (10) days after personal service or mailing of the dismissal decision and shows good cause for his failure to appear at the hearing. Lack of good cause will be presumed when a continuance of the hearing was not requested promptly upon discovery of the reasons for inability to appear at the hearing. . . ."

We recognize the apparent conflicts in the above sections but, reading them together, conclude that they establish the following procedures for the disposition of tax cases:

1. Unless the petitioner has clearly indicated he does not desire a hearing, the referee shall schedule a hearing in accordance with section 5033 of Title 22.

2. In the absence of a communication from the petitioner prior to the hearing date, the petition may be dismissed by the referee for failure of the petitioner to appear at the scheduled hearing, under section 5045(c) of Title 22. If the petitioner thereafter requests reopening, the decision whether to do so will be reached following the principles set forth in section 5045(d) of Title 22.

3. Section 1134(a) gives the petitioner the right to a review of the assessment and a decision on the merits without attending a hearing. To exercise that right, the petitioner must advise, prior to the hearing, that he has elected this alternative. Such an election does not preclude the referee from scheduling a hearing to receive evidence from the Department and other evidence which he deems necessary for reaching an informed decision.

Applying these principles to the present case, it is clear that the petitioner initially elected to have a hearing. Accordingly, the provisions of section 5045 of Title 22 of the California Administrative Code are applicable and the referee was correct in dismissing the appeal when the petitioner did not appear at the hearing. The question then becomes whether the petitioner has shown good cause for the nonappearance under subsection (d) of that section so as to entitle him to have the matter reopened.

There is evidence that the notice of hearing was sent to the address given by the petitioner, which was the same address to which he later requested correspondence be sent. There is further evidence that the notice was in fact delivered by the carrier to a box designated by a change of address card. Assuming regularity, it must be concluded that these instructions as to delivery came from the petitioner. Although the evidence is not conclusive, in our view it did establish prima facie that either the petitioner received the document or is responsible for its nondelivery and neither circumstance would provide cause for his nonappearance. This evidence was subject to rebuttal and the petitioner was given an opportunity to respond to it but presented nothing. In this setting, we find the petitioner was not entitled to have the matter reopened in order to have a hearing on the merits.

Yet to be resolved is the effect of the payment made by the claimant subsequent to the decision of the referee.

Section 1179.5(b) of the Unemployment Insurance Code provides as follows:

> "1179.5. If an employing unit pays the amount of contributions, penalties and interest assessed under Article 8 (commencing with Section 1126) of Chapter 4 of Part 1 of this division:
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> * * *

> "(b) Before the Appeals Board issues its decision upon an appeal from the referee's decision on a petition for reassessment, the payment shall constitute the filing of a claim for refund, the claim shall be deemed denied by the director, the denial shall be deemed affirmed by the referee, and the appeal shall automatically become an appeal from a referee's decision upholding the director's denial of the claim for refund."

The code provides two distinct and separate means for a petitioner to obtain a review of its grievance. Section 1134 provides that an employing unit may file with a referee a petition for reassessment, as the petitioner has done in this case. Section 1179 provides that after contributions, penalty or interest are collected, a claim for refund may be filed with the Department. Section 1180 provides that if such claim is denied by the Department the petitioner may file a petition for review with a referee. This section further provides for a hearing, unless a previous hearing has been held involving the same issues, in which case the petitioner is provided a means of presenting new and additional evidence.

It appears obvious that the purpose of section 1179.5 was to provide a means to avoid a multiplicity of administrative actions by consolidating the two actions when the second is taken while proceedings on the first are still in process. It would seem equally clear, however, that this section contemplates that the consolidation will only occur when a hearing has been held on the petition for reassessment and the referee has considered the matter on the merits. Where, as here, the initial action has been dismissed without such a consideration, the section should not be used to defeat a petitioner's right to seek redress by means of a claim for refund.

We conclude, therefore, that our action in dismissing the petitioner's petition for reassessment on procedural grounds in the present case is without prejudice to his right to claim a refund and that he is entitled to have the Department initially act on such a claim.

With respect to that matter, the case is remanded to the Department. It is requested that it determine from the petitioner whether he does, at this point, wish to claim a refund, and, if he does, that it act on such claim. If the Department's action is adverse to the petitioner, the petitioner then has the right of appeal to a referee.

DECISION

The decision of the referee dismissing the petition for reassessment is affirmed. The case is remanded to the Department for the purposes stated above.

Sacramento, California, November 13, 1969

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

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